Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LORI CRISAN and LISA DIDONATO,
Petitioners,

v.

A.G. EDWARDS & SONS, INC. and ANTHONY PIAZZA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

HUGO N. GERSTL *
GERSTL & GORMAN, INC.
Attorneys at Law
33 Soledad Drive
Monterey, CA 93940
(408) 649-0666
Attorneys for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED FOR REVIEW

Can the Court of Appeals properly dismiss an appeal for lack of jurisdiction to review a District Court's "order compelling arbitration" in a gender-based hostile work environment case when the District Court did not order arbitration, but where it granted an alternative motion to dismiss the complaint with prejudice under the provisions of FRCP Rule 12(b)(6)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
OPINIONS BELOW	2
BASIS FOR FEDERAL JURISDICTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	5
THE APPEALS COURT ERRED IN DISMISSING THE APPEAL RATHER THAN VACATING THE DISMISSAL AND REMANDING THE CASE TO THE DISTRICT COURT FOR FURTHER ACTION	5
CONCLUSION	8
APPENDICES:	
A. Order Dismissing Appeal for Lack of Jurisdiction, Lori Crisan (Ninth Circuit No. 94-16127)	1a
B. Order Dismissing Appeal for Lack of Jurisdiction, Lisa Di Donato (Ninth Circuit No. 94-16018)	2a
C. Order of U.S. District Court Dismissing First Amended Complaint Without Leave to Amend, Lori Crisan (USDC Civ. 94-20025 SW)	3a
D. Order of U.S. District Court Dismissing First Amended Complaint Without Leave to Amend, Lisa Di Donato (USDC Civ. 94-20026 SW)	9a
E. Order denying petition for rehearing and rejecting suggestion for rehearing en banc	15a

TABLE OF AUTHORITIES

Cases Page

Adair Bus Sales, Inc. v. Blue Bird Corp., 25 F.3d 953 (CA 10th, 1994) 2, 7
Alexander v. Gardner-Denver Co., 415 U.S. 36, 39 L.Ed.2d 147, 94 Sup.Ct. 1011 (1974) 5
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 114 L.Ed.2d 26, 111 Sup.Ct. 1647 (1991) 4, 5
Harris v. Forklift Systems, Inc., 510 U.S. ——, 126 L.Ed.2d 295, 114 Sup.Ct. 367 (1993) 5
Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (CA 9th, 1992) 4
Perrera v. Siegel Trading Co., 951 F.2d 780 (CA 7th, 1992) 7
Prudential Insurance Company of America v. Lai, 42 F.3d 1299 (CA 9th, 1994) 2, 4, 5, 6

Constitution and Statutes

Fifth Amendment to U.S. Constitution 3
9 U.S.C. §§ 3, 4 ..... 2, 3
9 U.S.C. § 16(a) (3) 2, 3, 7
28 U.S.C. § 1291 ..... 2, 3
42 U.S.C. §§ 2000e, 2000e(2) (a) 2, 3

IN THE

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LORI CRISAN and LISA DIDONATO,
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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioners LORI CRISAN and LISA DIDONATO respectfully petition this Court for a Writ of Certiorari to review the Orders of the United States Court of Appeals for the Ninth Circuit made and entered on March 24, 1995, which orders dismissed Petitioners' appeals on the ground that the Court lacks jurisdiction to review the District Court's Order compelling arbitration in an embedded proceeding [1].

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[1] Pursuant to Supreme Court Rule 14.1(b) the parties to this petition are LORI CRISAN and LISA DIDONATO, petitioners, who filed separate complaints and appeals in the courts below, but whose interests are joined in a single question (Supreme Court Rule 12.1), and A.G. EDWARDS & SONS, INC., a corporation,

OPINIONS BELOW

No official or unofficial reports of opinions delivered in this case are known to exist (Rule 14.1(d)).

The grounds on which the jurisdiction of this Court is invoked (Rule 14.1(e)) are as follows:

(a) The United States Court of Appeals for the Ninth Circuit rendered an opinion in this case that is in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *Prudential Insurance Company of America v. Lai*, 42 F.3d 1299 (CA 9th, 1994), which is identical to the question on appeal in the instant case; and with the United States Court of Apepals for the Tenth Circuit in *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953 (1994), which involves the same procedural question as is involved in the instant case (Rule 10.1(a)).

(b) The United States Court of Appeals for the Ninth Circuit has, in this case, so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, so as to call for an exercise of this Court's power of supervision (Rule 10.1(a)).

(c) The United States Court of Appeals for the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided federal questions in a way that conflicts with applicable decisions of this Court (Rule 10.1(c)).

BASIS FOR FEDERAL JURISDICTION

28 U.S.C. § 1291; Civil rights act of 1964, 42 U.S.C. §§ 2000e, 2000e(2)(a); 9 U.S.C. § 16(a)(3); 28 U.S.C. § 1291. Respondents contend that the Federal Arbitration Act, 9 U.S.C. §§ 3 and 4 govern.

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and ANTHONY PIAZZA, respondents, who were the defendants and appellees in both actions in the court below.

Pursuant to Supreme Court Rule 14.1(e), petitioners state:

The date of the Orders sought to be reviewed are March 24, 1995[2]. This is an original petition. The provisions of Supreme Court Rule 12.3 are inapplicable. The statutory provisions believed to confer jurisdiction on this Court are the Fifth Amendment to the United States Constitution, 42 U.S.C. §§ 2000e and 2000e(2)(a), 28 U.S.C. § 1291 and 9 U.S.C. § 16(a)(3). Respondents contend that 9 U.S.C. §§ 3 and 4 govern.

Pursuant to Supreme Court Rule 14(f) the Constitutional provisions involved are the Fifth Amendment to the United States Constitution (Right to trial by jury), the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, 2000e(2)(a), 12 U.S.C. § 1291, and the Federal Arbitration Act, 9 U.S.C. §§ 3, 4.

STATEMENT OF THE CASE

Petitioners—female employees of a stock brokerage house—brought action against the brokerage house and its supervising manager in U.S. District Court for (1) Creating and maintaining an abusive and hostile work environment in violation of the Civil Rghts Act of 1964, 42 U.S.C. §§ 2000e and 2000e(2)(a); (2) intentional infliction of mental and emotional distress in violation of California law; and (3) intentional interference with business relationships in violation of California law.

Respondents Moved to Dismiss the Complaint (FRCP Rule 12(b)(6)) and concurrently Moved to Compel Arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 3 and 4. Respondents contended that (1)

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[2] Petitioners requested rehearing and suggested that the matter be considered *en banc*. The request for rehearing was denied and the suggestion for hearing *en banc* was rejected. However, since the petitioners are not out of time to file the petition based on the initial orders, these latter motions need not be considered.

Petitioners signed a Uniform Application for Securities Industry Registration (U-4 Form); and (2) The U-4 Form required that disputes involving sexual harassment be resolved through mandatory arbitration.

On May 25, 1994, the United States District Court for the Northern District of California, Spencer Williams, J., dismissed the complaints without leave to amend, citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (CA 9th, 1992), but did *not* rule on the motion to compel arbitration (Appendix "C" and "D"), stating, at page 1, lines 13-20:

> "On May 25, 1994, the Court heard oral arguments regarding (1) defendants' Motion to Dismiss the First Amended Complaint and Compel Arbitration, and (2) defendants' Motion to Strike Plaintiffs' Opposition. Having carefully considered the relevant facts and law, the materials submitted by the parties and the arguments of counsel, the Court hereby (1) dismisses the First Amended Complaint without leave to amend and (2) denies defendants' Motion to Strike."

Petitioners timely appealed.

While the appeal was pending, the Ninth Circuit, in *Prudential Insurance Company v. Lai*, 42 F.3d 1299 (1994), held that the District Court could not compel arbitration under the same circumstances as exist in the instant case.

Respondents moved to dismiss the appeal on the ground that the Appeals Court lacks jurisdiction to review the District Court's order compelling arbitration in an embedded proceeding, *Prudential Insurance Company v. Lai*, 42 F.3d 1299, 1301 (1994).

Petitioners counter moved to vacate the District Court's Order of Dismissal and to Remand the case to the District Court for determination of whether or not the District Court should compel arbitration and stay the prosecution of the case pending arbitration.

The Court of Appeals for the Ninth Circuit ruled as follows:

> "Appellees' motion to dismiss this appeal for lack of jurisdiction is granted. *See Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299, 1301 (9th Cir. 1994) (this court lacks jurisdiction to review district court's order compelling arbirtation in embedded proceeding). All pending motions are denied as moot [3]."
>
> —Appendix "A," "B."

The instant petition follows.

REASONS FOR GRANTING THE PETITION

THE APPEALS COURT ERRED IN DISMISSING THE APPEAL RATHER THAN VACATING THE DISMISSAL AND REMANDING THE CASE TO THE DISTRICT COURT FOR FURTHER ACTION.

Although petitioners believe that a dispositive ruling of this court harmonizing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 L.Ed.2d 147, 94 Sup. Ct. 1011 (1974) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L.Ed.2d 26, 111 Sup. Ct. 1647 (1991), in light of this court's holding in *Harris v. Forklift Systems, Inc.*, 510 U.S. ——, 126 L.Ed.2d 295, 114 Sup. Ct. 367 (1993), would be desirable [4], this Court need not address the broader issue examined in those cases.

Rather, this Court need only concern itself with the procedural error committed by the Ninth Circuit in light of the actual ruling of the District Court when it abro-

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[3] Thereafter, petitioners filed a request for reconsideration and a suggestion for hearing *en banc* which were denied.

[4] Since this matter has been the subject of significant press coverage in the *Wall Street Journal*, June 9, 1994 (Pages 1 and A6) and August 18, 1994 (Pages C1 and C11) and the New York Times, April 26, 1995 (Pages C7, C8) and is presently the subject of a pending Congressional Bill, H.R. 4981 introduced in the 103d Congress, August 17, 1994, it is obviously an important social issue.

gated jurisdiction in what it claimed was the holding in *Prudential Insurance Company of America v. Lai,* 42 F.3d 1299 (CA 9th, 1994).

The District Court's Order of May 25, 1994 dismissed the complaint with prejudice and terminated the litigation. It did *not* compel arbitration and, indeed, it did not even address the issue. As such, it constituted a final decision.

On December 20, 1994, the Ninth Circuit decided *Prudential Insurance Company of America v. Lai,* 42 F.3d 1299 (CA 9th, 1994), which effectively disposed of the underlying issue on appeal to the Ninth Circuit in the instant case. Recognizing that the Ninth Circuit would have to rule in accordance with *Prudential* in this case, defendants moved the court for an order dismissing the appeal for lack of jurisdiction to hear the merits of the appeal.

Respondents could not truthfully state that the District Court *had* ordered the matter to arbitration, since the District Court had not ruled one way or the other on the issue. Thus, respondents argued that the District Court's ruling "had the *effect* of compelling [Petitioners'] federal and state law claims to arbitration." (2:7-8 of Respondents' Memorandum in support of Motion to Dismiss).

The District Court had *dismissed the complaint without leave to amend.* That order gave the petitioners only three alternatives:

1) They could attempt to seek arbitration through NASD or NYSE channels (although they had *not* been ordered or compelled to do so);

2) They could abandon their claim for hostile work environment based on gender, or

3) They could appeal the District Court's decision to the Ninth Circuit Court of Appeals, which they did.

The Court was faced with a similar situation in *Adair Bus Sales, Inc. v. Blue Bird Corporation,* 25 F.2d 953 (CA 10th, 1994). The court stated, at 25 F.3d 953, 955:

> "Had the District Court properly granted defendant's motion for a stay, the stay order would have been interlocutory because the plaintiff sought the arbitrability of the dispute. We would have no appellate jurisdiction. *Because, however, the appeal is presented to us upon the District Court's order of dismissal, we have appellate jurisdiction, 28 U.S.C. § 1291.* We decline to reach the merits of the plaintiff's appeal in light of our adoption of the majority view discouraging immediate appellate review in a proceeding in which relief other than a determination of arbitrability is sought. We therefore *vacate* the District Court's order of *dismissal* and *remand* for entry of a stay pending arbitration."

The differentiating factor here is that in *Adair* the District Court had dismised the complaint *and ordered the parties to proceed to arbitration.*

Not so in the instant case. Here, the District Court simply dismissed the Complaint without leave to amend.

Unquestionably, the District Court's Order was incomplete. If the Court had compelled arbitration, the order would not have been appealable, *Perera v. Siegel Trading Co.*, 951 F.2d 780 (CA 7th, 1992). But here the court did *not* order the parties to arbitrate and thus the matter was instantly appealable, 9 U.S.C. § 16(a)(3).

Undoubtedly the Ninth Circuit is caught on the horns of a dilemma. If it vacates the District Court's Order of Dismissal Without Leave to Amend and remands the matter to the District Court with instructions to rule on whether or not the Petitioners must arbitrate, the District Court *cannot* order arbitration for to do so would be to fly in the teeth of *Prudential Insurance Company of America v. Lai, supra,* 42 F.3d 1299 (CA 9th 1994).

But this panel of the Ninth Circuit cannot escape the clear ruling of *Prudential* by trying procedurally to abdicate its jurisdiction by relying on an Order of Dismissal which *does not say what this panel of the Ninth Circuit claims it says*!

CONCLUSION

For the reasons set forth above, this Court should grant the Petition for Writ of Certiorari and, upon review, reverse the Orders of the United States Court of Appeals for the Ninth Circuit and direct that Court to vacate the District Court's Order of Dismissal and remand the case to the District Court for an Order on Respondents' alternative motion to compel arbitration in light of *Prudential Insurance Company of America v. Lai*.

Respectfully submitted,

HUGO N. GERSTL *
GERSTL & GORMAN, INC.
Attorneys at Law
33 Soledad Drive
Monterey, CA 93940
(408) 649-0666
Attorneys for Petitioners

Dated: June 15, 1995

* Counsel of Record

APPENDICES

APPENDIX A

[Filed Mar. 24, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-16127

DC# CV-94-20025-SMW
Northern California
(San Jose)

LORI CRISAN,
Plaintiff-Appellant,

vs.

A.G. EDWARDS & SONS, INC., *et al.*,
Defendants-Appellees.

ORDER

Before: SNEED, POOLE and BRUNETTI, Circuit Judges

Appellees' motion to dismiss this appeal for lack of jurisdiction is granted. *See Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299, 1301 (9th Cir. 1994) (this court lacks jurisdiction to review district court's order compelling arbitration in embedded proceeding).

All pending motions are denied as moot.

APPENDIX B

[Filed Mar. 24, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-16018

DC# CV-94-20026-SMW
Northern California
(San Jose)

LISA DIDONATO,
Plaintiff-Appellant,

vs.

A.G. EDWARDS & SONS, INC., *et al.*,
Defendants-Appellees.

ORDER

Before: SNEED, POOLE and BRUNETTI, Circuit Judges

Appellees' motion to dismiss this appeal for lack of jurisdiction is granted. *See Prudential Ins. Co. of America v. Lai,* 42 F.3d 1299, 1301 (9th Cir. 1994) (this court lacks jurisdiction to review district court's order compelling arbitration in embedded proceeding).

All pending motions are denied as moot.

APPENDIX C

[Filed May 25, 1994]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 94-20025 SW

LORI CRISAN,

Plaintiff,

v.

A.G. EDWARDS & SONS, INC., and ANTHONY PIAZZA,

Defendants.

ORDER DISMISSING FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND; DENYING DEFENDANTS' MOTION TO STRIKE

On May 25, 1994, the Court heard oral argument regarding (1) Defendants' Motion to Dismiss the First Amended Complaint and to Compel Arbitration; and (2) Defendants' Motion to Strike Plaintiff's Opposition. Having carefully considered the relevant facts and law, the materials submitted by the parties and the arguments of counsel, the Court HEREBY (1) DISMISSES the First Amended Complaint WITHOUT LEAVE TO AMEND and (2) DENIES Defendants' Motion to Strike.

BACKGROUND

On November 27, 1992, Defendant A.G. Edwards, a retail stock brokerage, hired Plaintiff Lori Crisan to work as a registered sales assistant at its Monterey office. While she was employed at A.G. Edwards, Crisan alleges that Defendant Anthony Piazza, the Managing Agent of the

Monterey office, (1) regularly discussed sexual behavior and birth control methods; (2) told his female employees that he "didn't want anyone getting pregnant;" (3) frequently and publicly used profane language when referring to female employees; (4) made explicit comments regarding his genitalia; (5) falsely accused Crisan of spreading rumors that he had lied during an unemployment hearing; (6) imitated the way he believed Asians and Blacks talk; (7) referred to his employees as "guys;" (8) physically assaulted and manhandled her; (9) perpetually used foul and abusive language; (10) created a "reign of terror" in the office by shouting epithets in public places and hurling objects.

After she was terminated, Crisan notified A.G. Edwards of her grievances. A.G. Edwards sent out an attorney, Thomas Mickes, to investigate. Mickes took statements from Crisan, Piazza, and at least four other female employees. However, according to Crisan, Mickes attempted to cover up the women's testimony by preparing false affidavits and having them sign them without first showing them to her attorney. Crisan also alleges that A.G. Edwards transferred one of the women to Denver, Colorado in an effort to make it more difficult for her to "adduce competent testimony" and that it stalled hearings before the California Labor Commisisoner.

On January 11, 1994, Crisan filed a Complaint alleging that Defendants' conduct (1) created an abusive and hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e and 2000e-2(a); (2) constituted intentional infliction of mental and emotional distress in violation of California law; and (3) constituted intentional interference with her business relationships in violation of California law.

On February 11, 1994, Defendants filed a Motion to Dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and a Motion to

Compel Arbitration pursuant to §§ 3 and 4 of the Federal Arbitration Act, 9 U.S.C. § 3 and 4. Defendants' theory was that (1) on November 27, 1992, Crisan signed a Uniform Application for Securities Industry Registration (hereafter the "U-4 Form"); and (2) the U-4 Form required that disputes involving sexual harassment be resolved through mandatory arbitration.

On April 8, 1994, Crisan filed a First Amended Complaint which included a claim for rescission of her December 8, 1992 employment agreement. Crisan alleged, among many other things, that Defendants had used the arbitration provision contained in her employment agreement "as a sword and club that would force [her] to submit to violations of her dignity based on gender, abrogating her right to trial by jury." The First Amended Complaint makes no mention of her U-4 Form.

On April 25, 1994, Defendants filed a Motion to Dismiss Crisan's First Amended Complaint and Motion to Compel Arbitration on essentially the same grounds contained in their February 11, 1994, Motions. On May 18, 1994, Defendants filed a Motion to Strike Crisan's May 16, 1994 opposition to their April 25, 1994 Motions on the ground that the opposition was served less than fourteen days before the hearing. *See* Local Rules 220-3 and 100-3; Standing Order 3.

DISCUSSION

A. *Defendants' Motion to Dismiss the First Amended Complaint and to Compel Arbitration*

On November 27, 1992, Crisan executed a U-4 Form which provided in pertinent part that she agreed to "arbitrate any dispute, claim or controversy that may arise between [herself] and [A.G. Edwards], or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which [she] register[ed], as indicated in Ques-

tion 10 [of the U-4 Form]." Straeder Decl., Exh. A. In Question 10, Crisan registered with the New York Stock Exchange and therefore became subject to Rule 347 of the NYSE Rules of Arbitration, which provides that

> [a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

NYSE Guide (CCH) ¶ 2347 (1993). In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647 (1991), the Supreme Court held that Rule 347 requires mandatory arbitration of disputes arising under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* The Ninth Circuit has subsequently held, based on *Gilmer*, that an individual may be compelled to arbitrate disputes arising under Title VII. *See Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992). Furthermore, where a plaintiff's federal claim is subject to arbitration, her related state law claims are as well. *See Saari v. Smith Barney, Harris Upham & Co., Inc.*, 968 F.2d 877, 883 (9th Cir. 1992). Accordingly, if Crisan's U-4 Form is valid and enforceable, her case must be dismissed and sent to arbitration.

Crisan has made a rather confusing attempt to avoid arbitration. In her First Amended Complaint, she alleges that the arbitration clause contained in her December 8, 1992, employment agreement was invalid and should be rescinded. First Amended Complaint, ¶¶ 7-17. However, neither Defendants' February 11, 1994 Motion to Dismiss and to Compel Arbitration nor their April 25, 1994 Motion to Dismiss the First Amended Complaint and to Compel Arbitration have anything to do with her

December 8, 1992, employment agreement. They are based solely on her U-4 Form, signed on November 27, 1992. Accordingly, the claim for rescission of her employment agreement contained in the First Amended Complaint is completely irrelevant to this case.

Based on her opposition, filed April 8, 1994, along with the First Amended Complaint, it appears that Crisan intended to allege in her First Amended Complaint that her U-4 Form was invalid and should be rescinded. However, even if the allegations of the First Amended Complaint are construed as referring to Crisan's U-4 Form, there would still be no basis for denying Defendants' Motions.

The Supreme Court has stated in dicta that, in considering whether to enforce such an arbitration clause, "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." *Gilmer*, —— U.S. ——, 111 S.Ct. at 1656 (internal quotations omitted). The only allegations which Crisan makes in her First Amended Complaint which can be construed as applying to the arbitration provision of her U-4 Form are that (1) she did not realize or intend that it would require arbitration of claims for sexual harassment; (2) A.G. Edwards used the arbitration provision "as a sword and club that would force [her] to submit to violations of her dignity based on gender;" (3) she would be denied her constitutional right to a trial by jury if she is forced to arbitrate her dispute; and (4) by requiring that she arbitrate her dispute, the agreement frustrates the policies underlying Title VII.

None of the above claims have merit. The broad and inclusive language of the arbitration provision belies her first argument. The fallacy of her second allegation is made clear by the fact that Form U-4 was not even written by A.G. Edwards, but is rather a standard form

signed by all applicants for registration with the exchanges. Were the Court to accept her third argument, it would essentially be holding that all arbitration clauses are unenforceable. Finally, her fourth argument, that arbitration frustrates the purpose of Title VII, is expressly contradicted by the Ninth Circuit's holding in *Mago,* 956 F.2d 935, which states that employees may be compelled to arbitrate such disputes.

B. *Defendants' Motion to Strike Crisan's Opposition, Filed May 16, 1994*

Defendants correctly contend that Crisan failed to file her May 16, 1994 opposition at least fourteen days before the hearing on their Motions. Local Rule 220-3. Based on Local Rule 100-3 and Standing Order 3, the Court has the discretion to disregard Crisan's opposition or to fine her or her attorney a minimum of $500 for filing it out of time. However, the Court will accept Crisan's opposition and will not levy a fine.

IT IS SO ORDERED.

DATED: 25 May 1994

/s/ Spencer Williams
United States District Judge

APPENDIX D

[Filed May 25, 1994]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 94-20026 SW

LISA DIDONATO,

Plaintiff,

v.

A.G. EDWARDS & SONS, INC., and ANTHONY PIAZZA,

Defendants.

ORDER DISMISSING FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND; DENYING DEFENDANTS' MOTION TO STRIKE

On May 25, 1994, the Court heard oral argument regarding (1) Defendants' Motion to Dismiss the First Amended Complaint and to Compel Arbitration; and (2) Defendants' Motion to Strike Plaintiff's Opposition. Having carefully considered the relevant facts and law, the materials submitted by the parties and the arguments of counsel, the Court HEREBY (1) DISMISSES the First Amended Complaint WITHOUT LEAVE TO AMEND and (2) DENIES Defendants' Motion to Strike.

BACKGROUND

On July 23, 1992, Defendant A.G. Edwards, a retail stock brokerage, hired Plaintiff Lisa DiDonato to work as a registered sales assistant at its Monterey office. While she was employed at A.G. Edwards, DiDonato alleges that Defendant Anthony Piazza, the Managing

Agent of the Monterey office, (1) called her into his office to discuss the method of both control which she was using and subsequently discussed the method which she used with other female employees; (2) called her the "nigger of the office" on several occasions, sometimes within the hearing of other employees; (3) frequently and publicly told his female employees that he "didn't want anyone getting pregnant and having babies around here;" (4) frequently and publicly used profane language when referring to female employees; (5) made explicit comments regarding his genitalia; (6) frequently referred to female employees as "having female problems;" (7) told DiDonato and other employees that he viewed Plaintiff "in the same light as the guy who stabbed Monica Seles —she's crazy and suicidal;" (8) told her that he "owned her," since no one else would have given her the opportunity to become a Series 7 registered securities employee; (9) frequently and publicly imitated the way he believed Asians and Blacks talk; (10) referred to his employees as "guys;" (11) physically assaulted and manhandled her; (12) perpetually used foul and abusive language; (13) falsely accused her of having "legal problems" and lying on her employment application; (14) lied under oath at her unemployment hearing and induced another female employee to do so; (15) told other employees, as well as individuals at Dean Witter Reynolds, that she was "crazy," was a "drug addict," and "deserved a good beating:" (16) told certain employees that he could not fire another female employee because she was giving sexual favors to certain male employees; (17) created a "reign of terror" in the office by shouting epithets in public places and hurling objects.

After she was terminated, DiDonato notified A.G. Edwards of her grievances. A.G. Edwards sent out an attorney, Thomas Mickes, to investigate. Mickes took statements from DiDonato, Piazza, and at least four other female employees. However, according to DiDonato, Mickes attempted to cover up the women's tes-

timony by preparing false affidavits and having them sign them without first showing them to her attorney. DiDonato also alleges that A.G. Edwards transferred one of the women to Denver, Colorado in an effort to make it more difficult for her to "adduce competent testimony" and that it stalled hearings before the California Labor Commissioner.

On January 11, 1994, DiDonato filed a Complaint alleging that Defendants' conduct (1) created an abusive and hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e and 2000e-2(a); (2) constituted intentional infliction of mental and emotional distress in violation of California law; and (3) constituted intentional interference with her business relationships in violation of California law.

On February 11, 1994, Defendants filed a Motion to Dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and to Compel Arbitration pursuant to §§ 3 and 4 of the Federal Arbitration Act, 9 U.S.C. § 3 and 4, on the ground that DiDonato's July 23, 1992 employment application contained a mandatory arbitration clause.

On April 8, 1994, DiDonato filed a First Amended Complaint, which included a claim for rescission of what she described as her July 23, 1992 "employment agreement." DiDonato alleged, among many other things, that Defendants had used the arbitration provision contained in her employment agreement "as a sword and club that would force [her] to submit to violations of her dignity based on gender, abrogating her right to trial by jury."

On April 25, 1994, Defendants filed a Motion to Dismiss DiDonato's First Amended Complaint on essentially the same grounds as were contained in their February 11, 1994, Motions. On May 18, 1994, Defendants filed a Motion to Strike DiDonato's opposition to their

April 25, 1994 Motions on the ground that the opposition was served less than fourteen days before the hearing on their Motions. *See* Local Rules 220-3 and 100-3; Standing Order 3.

DISCUSSION

A. *Defendants' Motion to Dismiss the First Amended Complaint and to Compel Arbitration*

On July 23, 1992, DiDonato signed an employment application which provided as follows:

> In consideration of A.G. Edwards & Sons, Inc. undertaking the aforementioned investigation and consideration of my application for employment, I agree that any controversy or dispute arising between me and A.G. Edwards & Sons, Inc. in respect to this application, A.G. Edwards & Sons, Inc.'s consideration of my employment, my employment by A.G. Edwards & Sons, Inc., or the termination of that employment by A.G. Edwards & Sons, Inc. shall be submitted for arbitration before the New York Stock Exchange, Inc. or the National Association of Securities Dealers, Inc.

Straeder Decl., Exh. A.

An individual may be compelled to arbitrate a dispute arising under Title VII based on an arbitration provision contained in his or her employment application. *Mago v. Shearson-Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992). Furthermore, where a plaintiff's federal claim is subject to arbitration, his or her related state law claims are as well. *See Saari v. Smith Barney, Harris Upham & Co., Inc.*, 968 F.2d 877, 883 (9th Cir. 1992). Accordingly, if the arbitration clause in DiDonato's employment application is valid, her case must be dismissed and sent to arbitration.

DiDonato has made a rather confusing attempt to avoid arbitration. In her First Amended Complaint, she al-

leges that the arbitration clause contained in her July 23, 1992 "employment agreement" was invalid and should be rescinded. First Amended Complaint, ¶ 7. The First Amended Complaint then goes on to allege various grounds for rescission occurring on or about December 9, 1992. First Amended Complaint, ¶¶ 8-17. DiDonato's July 23, 1992 employment application is not mentioned anywhere in the First Amended Complaint. Accordingly, the claim for rescission of her "employment agreement" contained in the First Amended Complaint is completely irrelevant to this case.

Based on her opposition, filed on April 8, 1994 along with the First Amended Complaint, it appears that DiDonato intended to allege in her First Amended Complaint that her July 23, 1992 employment application was invalid and should be rescinded. However, even if the allegations of the First Amended Complaint are construed as referring to DiDonato's employment application, there is still no basis for denying Defendants' Motions.

The Supreme Court has stated in dicta that, in considering whether to enforce an arbitration clause, the "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." *Gilmer v. Interstate/Johnson Lane Corp.*, —— U.S. ——, 111 S.Ct. 1647, 1656 (1991) (internal quotations omitted). The only allegations which DiDonato makes in her First Amended Complaint which can be construed as applying to the arbitration provision of her employment application are that (1) she did not realize or intend that it would require arbitration of claims for sexual harassment; (2) A.G. Edwards used the arbitration provision "as a sword and club that would force [her] to submit to violations of her dignity based on gender;" (3) she would be denied her constitutional right to a trial by

jury if she is forced to arbitrate her dispute; (4) that there was no consideration to support the arbitration agreement; and (5) by requiring that she arbitrate her dispute, the agreement frustrates the policies underlying Title VII.

None of the above claims have merit. The broad and inclusive language of the arbitration provision belies her first argument. Were the Court to accept her second and third arguments, it would essentially be holding that all arbitration agreements are unenforceable. Her fourth argument, that there was no consideration for the arbitration provision, is directly contradicted by the language of the agreement. Finally, her fifth argument, that arbitration frustrates the purpose of Title VII, is expressly contradicted by the Ninth Circuit's holding in *Mago*, 956 F.2d 935, which states that employees may be compelled to arbitrate such disputes.

B. *Defendants' Motion to Strike DiDonato's Opposition, Filed May 16, 1994*

Defendants correctly contend that DiDonato failed to file her May 16, 1994 opposition at least fourteen days before the hearing on their Motions. *See* Local Rule 220-3. Based on Local Rule 100-3 and Standing Order 3, the Court has the discretion to disregard DiDonato's opposition or fine her or her attorney a minimum of $500 for filing it out of time. However, the Court will accept DiDonato's opposition and will not levy a fine.

IT IS SO ORDERED.

DATED: 25 May 1994

/s/ Spencer Williams
United States District Judge

APPENDIX E

[Filed May 4, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-16127

DC# CV-94-20025-SMW
Northern California
(San Jose)

LORI CRISAN,
Plaintiff-Appellant,

vs.

A.G. EDWARDS & SONS, INC., *et al.*,
Defendants-Appellees.

ORDER

Before: SNEED, POOLE and BRUNETTI, Circuit Judges

The petition for rehearing is denied. The suggestion for rehearing en banc is rejected.